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No. 681

IN THE

# Supreme Court of the United States

October Term, 1955

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February, 1956.

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No.

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v.

FEDERAL COMMUNICATIONS COMMISSION

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Southside Virginia Telecasting Corporation, a Virginia corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on December 29, 1955.

### OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A, hereto, *infra* p. 1a, has not yet been reported.

### JURISDICTION

The judgment of the Court of Appeals was entered on December 29, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

### QUESTION PRESENTED

Whether under Section 402(g) of the Communications Act and Sections 7(c) and 10(e) of the Administrative Procedure Act, which require that agency decisions made

after hearing be based upon substantial evidence on the whole record, the Federal Communications Commission may disregard positive and credited testimony as entitled to no weight.

## STATUTES INVOLVED

The pertinent Sections of the Communications Act of 1934, as amended, 66 Stat. 715-20, 47 U.S.C. 309(a), 309(b), 402(b), and 402(g) provide as follows:

> "Sec. 309(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> "(b) If upon examination of any such application the Commission is unable to make the finding specified in subsection (a), it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to make such finding. . . . Following such notice, the applicant shall be given an opportunity to reply. If the Commission, after considering such reply, shall be unable to make the finding specified in subsection (a), it shall formally designate the application for hearing on the grounds or reasons then obtaining . . . . . Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate . . .
>
> "Sec. 402(b). Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:
>
> "(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.
>
> * * *
>
> "(g) At the earliest convenient time the court shall hear and determine the appeal upon the record before

it in the manner prescribed by section 10(e) of the Administrative Procedure Act.

The pertinent portion of Section 7(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. 1006 provides as follows:

> ". . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. . . ."

The pertinent portion of Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1009 provides as follows:

> "(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (b) hold unlawful and set aside agency action, findings, and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; . . . In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

## STATEMENT

This petition seeks review of a judgment affirming a decision and order of the Federal Communications Commission which granted the application of Petersburg Television Corporation (Intervenor in the Court below) for a construction permit for a new television station to be located at Petersburg, Virginia and denied the competing application for the same facilities filed by Petitioner.

This decision by the Commission was rendered after a comparative statutory hearing and after an Initial Decision by the Hearing Examiner granting Petitioner's application and denying the application of Petersburg Television Corporation (R. 282-83).[1]

Upon review, on October 1, 1954, the Commission reversed the Hearing Examiner on every determination in favor of Petitioner, rejected the recommendations of its own Broadcast Bureau,[2] and by a vote of three to two, granted the application of Petersburg Television Corporation and denied the application of Petitioner. The dissenting Commissioners voted to affirm the Hearing Examiner's Initial Decision (R. 282; 332).

The main basis of the Commission's decision was its finding that Petitioner's programming proposal involved *the total disregard* of that portion of its service area, located north of Petersburg (R. 303-05). Based on this finding, it concluded that Petersburg Television Corporation should be preferred since its "service philosophy" would be to serve all portions of its service area (R. 322-25; 331).[3]

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[1] The gist of the Examiner's Initial Decision is summarized in Paragraph 10 (R. 268):

> "10. Consideration of the importance of the relative factors of preference between the applicants leads to the conclusion that Southside Virginia Telecasting Corporation gives assurance of a more complete and effective response to the needs of Petersburg than might be expected of Petersburg Television Corporation and that the programs, operating policies, and over-all plans proposed by Southside, and the much greater integration of its personnel into the community, justify the conclusion that Southside Virginia Telecasting Corporation is better qualified to meet the needs of Petersburg and its surrounding area than is Petersburg Television Corporation."

[2] The Broadcast Bureau supported the Hearing Examiner's ultimate decision that Petitioner was to be preferred (R. 269-78; 282-83).

[3] The decision was also based on other secondary grounds not involved in this Petition for Certiorari.

The crucial finding that Petitioner would totally disregard the northern portion of its service area was made in the face of express and positive testimony by Petitioner's President, majority stockholder, and witness-in-chief (Louis Peterson) that Petitioner's proposal was to emphasize service to Petersburg and the southern portion of its service area and to treat the northern portion on a secondary basis (R. 88; 107; 117; 303-05).[4] The Commission held nevertheless that the "record does not support Peterson's assertions" and that "on the face of the record, we cannot attach weight to Peterson's general profession on this score" (R. 305). Other testimony by Peterson, further corroborating the testimony afforded no weight by the Commission, was not even considered: that the past programming of Radio Station WSSV upon which Petitioner's television programming was based did not disregard the north;[5] that the specific program proposals of Petitioner established it would serve the interests of the north;[6] that Petitioner would sell advertising in the northern part of its service area.[7]

The testimony of Peterson which was disregarded as having no weight was fully credited; Peterson's credibility was fully accepted by the Commission (R. 289; 290; 327-28). The Commission held:

> "The picture presented to us leaves no doubt of an excellent operation in the public interest. We there-

[4] The Commission made clear that if this testimony had been accepted, the ultimate decision would have been materially affected (R. 324-25).

[5] R. 77-80; 82-86; 97-101; 195-96; 247; 274.

[6] R. 93; 95; 97-98; 106-10; 116-21; 200-210; 215-16; 310; 318-19. Examples of specific testimony disregarded by the Commission were that live talent from the northern portion of the service area would be presented (R. 121) and announcements would be made in behalf of churches located in the northern portion of the service area (R. 92).

[7] R. 102-04 312-13.

> fore find that the parties can be relied upon to carry out their proposals and to be sensitive to the needs and desires of the areas *which they have stated are of concern to them.* In this connection, we note that several of the programs proposed to be carried over the applicant's television station are already features of the AM operations." (R. 328) (Emphasis supplied)

Moreover, Peterson was a witness who could testify in behalf of Petitioner with knowledge and authority. Peterson was the moving force behind Petitioner's application; he personally prepared the program proposal and he would be responsible for its execution as majority stockholder and General Manager of the station (R. 289-290). He would devote 80 to 85% of his total time to the management of the station on a day-to-day basis (*Ibid*). He was a witness who had knowledge of Petitioner's program proposal, authority to make representations concerning them, and power and authority to carry them out.

The sole basis of the Commission's determination that the credited and positive testimony of Peterson would be given no weight was the negative inference it drew from the fact that Petitioner had made no "contacts" in the area north of Petersburg (R. 304). This evidence was not inconsistent with Peterson's testimony in any way. On the basis of the negative inference, and without giving any consideration to the reasons why such contacts were not made, it disregarded all the unimpeached testimony of Peterson just as if it had not been put in evidence.

After a Petition for Rehearing, Reconsideration and Re-Argument was denied (R. 336-42),[8] Petitioner filed an appeal in the United States Court of Appeals for the District of Columbia Circuit (R. 2-3). On December 29, 1955,

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[8] Three of the members constituted the original majority; the fourth was a dissenter who felt there should be no further review of the original decision but who did not change his original dissent. A majority of the whole Commission has never voted for the decision on the merits at any time.

that Court, in a *per curiam* opinion, affirmed the action of the Commission holding that the Commission had not "acted arbitrarily in choosing between the applicants" (Appendix A, p. 1b). Despite the nature of the opinion, it is clear that the Court decided that the Commission's determination to give no weight to Peterson's credited testimony was not arbitrary. This conclusion is inescapable since the Commission conceded before the Court of Appeals that the disregarded testimony had been afforded "no weight"; it argued that the determination that the "general professions regarding programming were entitled to no weight was entirely reasonable". Brief of Federal Communications Commission in Court below, page 8.

## REASONS FOR GRANTING THE WRIT

1. The decision of the Court below conflicts with decisions of this Court and decisions of the Courts of Appeal for the Fifth, Sixth, Seventh and Eighth Circuits, to wit: *Dickinson* v. *United States,* 346 U.S. 389; *Kansas City So. Ry. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573, 595-96; *NLRB* v. *Tex-O-Kan Flour Mills,* 122 F. 2d 433 (C.A. 5); *NLRB* v. *Ohio Calcium Co.,* 133 F. 2d 721 (C.A. 6); *NLRB* v. *Sheboygan Chair Co.,* 125 F.2d 436 (C.A. 7); *American Smelting and Refining Co.* v. *NLRB,* 126 F.2d 680, 688 (C.A. 8).

It is a firmly established principle of law that uncontradicted testimony or evidence fully credited and worthy of belief cannot be totally disregarded by a fact finder as entitled to no weight whatsoever. *Dickinson* v. *United States,* 346 U.S. 389; *Kansas City So. Ry. Co.* v. *C. H. Albers Commission Co.,* 223 U.S. 573; see 7 WIGMORE, EVIDENCE, Section 2034; 9 WIGMORE, EVIDENCE, Section 2495.

This principle has been consistently applied to administrative decisions rendered after a statutory hearing.

In *NLRB* v. *Tex-O-Kan Flour Mills,* 122 F.2d 433 (C.A. 5), the Court held that the testimony under oath of one who has knowledge cannot be disregarded in the absence of impeachment or substantial contradiction, "or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point." 122 F.2d at 439. The holding in *American Smelting and Refining Co.* v. *NLRB,* 126 F.2d 680, 688 (C.A. 8) is identical. Likewise, in *NLRB* v. *Sheboygan Chair Co.,* 125 F.2d 436 (C.A. 7), Judge Minton reaffirmed the basic principle that an administrative agency is not justified in disregarding evidence when it is given by "honorable men, wholly unimpeached, testifying under oath", and the testimony is consistent with other evidence. In that case, as here, the Labor Board disregarded the Examiner's findings and his report. Judge Minton went on to hold, "The Board should not discard the positive creditable testimony of witnesses in favor of an inference drawn from tenuous circumstances that at best could have supported only an anemic suspicion. Such an inference does not meet the test of substantial evidence," 125 F.2d at 439. See also *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (C.A. 6).

It must be emphasized that this is not a case in which the Commission has refused to follow its Hearing Examiner in crediting testimony. See, *e.g., NLRB* v. *Pyne Molding Corporation,* 226 F.2d 818 (C.A. 2). Like the Hearing Examiner who credited the testimony and rendered a decision in favor of Petitioner, the Commission itself also credited the testimony, going out of its way to determine expressly that it could rely on Peterson and Petitioner to carry out Petitioner's proposal and to be sensitive to the needs and desires of the areas which Peterson stated would be of concern to him (R. 328). As a matter of fact, not only did both the Examiner and the Commission credit the testimony involved, but the other parties to the proceedings, Petersburg Television Corporation and the Broadcast Bureau also both expressly

credited the specific testimony disregarded by the Commission without any weight. (R. 117; 247-48; 272; 274-75; 280). The decision of the Court below was therefore especially erroneous since, under the decision of this Court in *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474, such matters are relevant to the determination whether the Commission's findings are substantially supported in accordance with law. *Cf. United States* v. *Interstate Commerce Commission,* 91 App. D.C. 178, 183, 198 F.2d 958, 963, *cert. den.*, 344 U.S. 893; *Wyman Gordon Co.* v. *NLRB,* 153 F.2d 480, 493 (C.A. 7); *NLRB* v. *Ohio Calcium Co.,* 133 F.2d 721 (C.A. 6). The uncontradicted evidence here was plausible and was fully supported by the other evidence in the record, disregarded by the Commission. Most important, it came from a witness whom the Commission recognized could be relied upon to fulfill his representations. Under these circumstances, the decision of the Court below that the Commission had the power to disregard this testimony as without weight is clearly erroneous and in conflict with the well-settled principles enunciated in the cases cited above.

2. The decision below is erroneous and presents a square conflict of decisions on a question of importance to the many persons who come before the Federal Communications Commission as applicants for radio and television stations. Such persons are entitled to the same treatment as other persons affected by the administrative process. Yet because the appellate provisions of the Communications Act (Section 402) provided that the Circuit Court of Appeals for the District of Columbia shall have exclusive jurisdiction over appeals involving applications for broadcast licenses, such persons will be placed in a position where their positive, credited, and plausible testimony may be disregarded as without weight by the Federal Communications Commission even though other administrative agencies, whose decisions are reviewed by other courts, would not be permitted to take the same action.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Certiorari should be granted.

LEONARD H. MARKS
PAUL DOBIN
*Counsel for Southside Virginia Telecasting Corporation*

February 9, 1956.

# APPENDIX

## APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 12546

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
PETERSBURG TELEVISION CORPORATION, INTERVENOR

---

Appeal from the Federal Communications Commission

---

Decided December 29, 1955

* * * * * * * * * * *

Before EDGERTON, Chief Judge and WILBUR K. MILLER and WASHINGTON, Circuit Judges.

PER CURIAM: The appellant and the intervenor each applied to the Federal Communications Commission for a construction permit for a television station in Petersburg, Virginia. After a comparative hearing the Commission denied the appellant's application and granted the intervenor's. We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants.

*Affirmed.*

* * * * * * * * * * *

Filed Dec. 29, 1955

**Judgment**

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the Federal Communications Commission appealed from in this case be, and the same is hereby, affirmed.

Dated: December 29, 1955.

*Per Curiam.*

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IN THE

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October Term, 1955

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No.

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SOUTHSIDE VIRGINIA TELECASTING CORPORATION,
*Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR PETERSBURG TELEVISION CORPORATION IN OPPOSITION

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### OPINION BELOW

The opinion of the Court of Appeals is printed as Appendix A to the Petition for a Writ of Certiorari. It has not been reported.

## JURISDICTION

The Petitioner invoked the jurisdiction of this Court under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

## QUESTION PRESENTED

The Petitioner states the question before this Court to be whether the Federal Communications Commission, in rendering a decision after hearing based upon substantial evidence on the whole record, "may disregard positive and credited testimony as entitled to no weight." Respondent asserts that the decision of the Court below does not present this question for review on certiorari but rather the question of whether this Court will review and disturb the decisions of the administrative agency and the Court below upon a substantial evidence question.

## STATUTES INVOLVED

The Petition for a Writ of Certiorari sets out the sections of the Communications Act of 1934, as amended, and of the Administrative Procedure Act which the Petitioner alleges to be relevant.

## STATEMENT

Petitioner and Respondent, Petersburg Television Corporation, filed mutually conflicting applications for permits to construct a television station on Channel 8 in Petersburg, Virginia. Both applicants proposed to locate their studios in Petersburg, a city of 36,000 population, and to serve Petersburg as the "principal community" to which the channel had been allocated by the Federal Communications Commission. Both, however, located their antenna and transmitter sites to the north of Petersburg in the direction of Rich-

mond, which lies 23 miles north of Petersburg. In fact, Petitioner's transmitter site was only three tenths of one mile farther from Richmond than was Respondent's site (R. 317). With the transmitter sites so located, both of the proposed stations would provide service to Richmond and its surrounding area as well as to Petersburg and its surrounding area. To this extent the proposals of Petitioner and Respondent were quite similar.

However, in the matters of programming and preparation to serve the needs of the areas to be served, the similarity between the applications ended. Petitioner's president, Mr. Peterson, testified that Petitioner's proposed station would place "primary" emphasis in its programming upon roughly the southern half of its proposed service area—the area commonly known as "Southside Virginia", while giving "secondary" attention to the northern half of Petitioner's service area, including Richmond (R. 304).

Other portions of Peterson's testimony made it clear, however, that only to the extent that the Richmond stations might fail for some reason to serve the needs of the northern half of Petitioner's service area would Petitioner propose programs to meet those needs (R. 304). Moreover, the record showed that none of Petitioner's proposed programs, except those which were state or national in scope, was designed to serve the particular needs of the communities in the northern half of the service area. On the contrary, they were all tailored to serve Petersburg and the southern half of the service area—"Southside Virginia" (R. 304-6, 322). Further, the record clearly demonstrated that in making preparations for its programming, Petitioner had made program contacts in Petersburg and

the southern half of its service area but had made no contacts at all in the many communities in the northern half of its service area (R. 304-306).

In sharp contrast, Respondent, Petersburg Television Corporation, proposed to serve the needs of its entire service area, including Petersburg, Richmond and the many small communities in both the northern and southern segments. Moreover, Respondent designed its programming for the entire area and made program contacts throughout the entire area (R. 292-293, 322-325).

Upon all of these facts and giving full and detailed consideration to the differing service philosophies of the two applicants, the Commission concluded that, in the public interest, it must choose the applicant (Respondent) who proposed to make the full use of the facility awarded to it by serving the needs of the entire area capable of receiving its signal as against the applicant (Petitioner) who proposed to serve the needs of only half of its service area (R. 322-26, 331).

In reaching this conclusion, the Commission, upon a weighing of all the evidence of record, found that it could not attach weight to Mr. Peterson's general professions to the effect that Petitioner would give "secondary" attention to the northern sector in view of the contradictory evidence demonstrating that none of Petitioner's programs was particularly designed for the northern sector and that no program contacts were made by Petitioner in that sector (R. 305). For, despite Peterson's assertion that Petitioner would "emphasize" service to Southside Virginia, the other evidence of record made it clear that Peterson's service equation was one of "emphasis" *over nothing*

which, in effect, equalled "disregard" of the needs of the northern sector.

Following the Commission's final decision on September 29, 1954 (R. 282-332), favoring Respondent and denying Petitioner's application, Petitioner requested rehearing before the Commission. This was denied by the Commission's Memorandum Opinion and Order of December 27, 1954 (R. 336-43) in which the Commission once again reviewed all of the evidence of record, including that evidence which Petitioner then asserted had been ignored by the Commission,—the same evidence which Petitioner now insists in its Petition for Certiorari was ignored by the Commission.

Thereafter, Petitioner filed its appeal in the United States Court of Appeals for the District of Columbia Circuit. Respondent intervened in that action. In its Brief and oral argument before that Court, Petitioner once more urged that the Commission had disregarded and ignored what Petitioner considered to be "uncontradicted" evidence. In the Brief, Joint Appendix and oral argument submitted by Petitioner to the Court of Appeals that evidence and the Commission's treatment of it was set forth and delineated in great detail. But the Court of Appeals could not agree with Petitioner and, in a unanimous *per curiam* decision, dated December 29, 1955, affirmed the Commission, holding: "We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants." (See Appendix A to Petition for Writ of Certiorari.)

## REASONS FOR DENYING THE WRIT

The only question presented by this case is whether the Federal Communications Commission, after a full evidentiary hearing, acted in accordance with the substantial evidence of record. It does not present the question urged by Petitioner as to whether an administrative agency may refuse to give weight to uncontradicted testimony. The Commission here considered the evidence which Petitioner alleges it ignored and found it to be contradicted by the other evidence of record. The Court below reviewed the Commission's actions and concluded that it had not ignored factors requiring consideration. The decision below does not present a conflict with the decisions of other circuits nor does it present a question of such public importance as to merit or require the exercise of discretion by this Court in reviewing the decision upon certiorari.

## ARGUMENT

Petitioner would have this Court believe that the effect of the decision of the Court below is a ruling by that Court that the Commmission has the power to disregard positive, credited and uncontradicted evidence. This result, Petitioner asserts, conflicts with the rulings of other circuits on the point.

But Petitioner's argument begs the question by assuming that the evidence was, in fact, "uncontradicted" and was, in fact, "disregarded". Both the Commission's carefully delineated final decision and its memorandum opinion and order denying rehearing reviewed and fully considered the evidence which Petitioner asserts it disregarded. Further, having so considered that evidence in the light of the other contra-

dictory evidence of record, the Commission found and concluded that it was, in fact, contradicted by the other evidence of record. In so doing, the Commission followed this Court's admonition in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 488, that "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

An examination of excerpts from the Commission's final decision and its later opinion denying rehearing leaves no doubt as to the Commission's consideration of the evidence and as to the basis for its conclusion. In its final decision of September 29, 1954, the Commission said (R. 303-305):

> "19. Southside's programming proposal shows a marked difference in service philosophy from that of PTC. Its president, Peterson, stated that Southside 'will be principally concerned with serving the needs of the City of Petersburg and the Southside [area] as distinguished from the City of Richmond and the area [north] of Southside' (Tr. 759-760). It is Mr. Peterson's view that there are distinct differences between the needs of the public of Richmond and the northern Virginia counties in the service area as distinguished from the needs of Petersburg and the Southside Virginia area. It will be Southside's purpose to fill the needs of the latter area on the assumption that Richmond stations will serve the needs of that community and the northern counties. This assumption applies to all categories of programs—entertainment, agricultural, educational, religious, news, discussion and talks. The record indicates that only to the extent that the Richmond stations should fail to serve such needs would Southside propose to program its station to meet those needs.
>
> 20. It is important that we delineate carefully our finding here. We have noted the testimony of

Peterson that Southside will not ignore the roughly northern half of its service area but will only relegate it to a secondary role (Tr. 618, 759-760, 711). But the record does not support Peterson's assertions here. Although Southside made rather complete preparations for its programming proposal in the Petersburg and Southside Virginia area, no contacts at all were made in the area north of Southside Virginia (see par. 21, *infra*). Communities such as Powhatan, Surry, Amelia, Richmond, Goochland, King and Queen, Ellerson, all of which were contacted by PTC, were ignored by Southside. Since WSSV does not serve that area (see par. 28, *infra*), it follows that Southside's programming schedule was made up without any knowledge or specfiic regard for that area's needs or desires. Indeed, the Examiner found that 'the evidence shows that all of [Southside's] programs are designed for Petersburg and the so-called Southside Virginia area and give no heed to the area North of the James River (which includes the City of Richmond) nor to the area East and West of the counties included in Southside Virginia, except as to those matters relating to state and national activities which arise in Richmond and in which, in the judgment of the applicant's management, the people of Petersburg and the surrounding area would be interested.' * * * In our recent *Tampa Times* decision (FCC 54-1132), we stressed the importance of the programming proposal, since it is by that proposal that we can judge the applicant's concept of the needs of the area and his service philosophy. The proposal and the nature of the preparation behind it represent the applicant's concept of service philosophy and of how his station should be programmed. As such, it completely overrides general professions by the parties of 'good programming', 'fulfillment of the area's needs', and 'service to the entire area.' In this case, the proposal,

and particularly the complete lack of program contacts in the roughly northern half of the service area, demonstrate that Southside's service philosophy is to ignore that area, barring the contingency noted in the prior paragraph; in the face of this record, we cannot attach weight to Peterson's general professions on this score."

Thereafter, in its Memorandum Opinion and Order denying Petitioner's request for rehearing, the Commission again reviewed Petitioner's contentions and said (R. 338-339):

"4. Southside also attacks the factual bases on which the service philosophy holding rests. Most of the arguments here made were considered by us in reaching our September 29 decision, and we do not believe repetition of our reasons for rejecting them would serve any useful purpose. We shall, however, briefly touch on some of these contentions and others advanced for the first time. Southside argues that the Commission's finding, that it will ignore the northern half of its coverage area, is contrary to the weight of the evidence. In support, it cites the testimony of its president, Peterson, that Southside intended to serve the southern portion 'on a primary basis' and the northern 'on a secondary basis,' and that if the Richmond stations 'did not supply religious, educational or any public service thing in our area, [Southside] would be glad to do it' (Tr. 764) As to the first point, we noted such testimony at the outset of our discussion in paragraph 20: We reaffirm our conclusion that in the face of Southside's actual proposal and particularly the nature of the preparation made with respect to it, weight cannot be attached to Peterson's general professions on this score. Southside's second point ignores the rationale set out in the prior paragraph—specifically, that it is a matter of provid-

> ing an *additional* outlet or opportunity for local expression in the many small communities in the northern segment. On this score, Southside also argues that PTC's service to the area in question is 'reception' service (or the mere presence of a listenable signal) and not 'transmission' service (or the expression of local interests). But the programming contacts made by PTC in the area (see fn. 18) and the programs planned (see, e.g., 'Chamber of Commerce Round Table,' 'Morning Devotions') show this argument to be without merit."

It is thus clear that the Commission carefully considered Petitioner's evidence and the arguments based thereon—not once, but twice—and concluded that it was outweighed and contradicted by the other evidence of record. Moreover, it should be observed that the contradictory evidence,—in the form of Peterson's testimony, the Petitioner's program plans and program contacts,—went to the exact point which Petitioner asserts it established by "uncontradicted" testimony.

In the light of the foregoing, it is unnecessary for this Court to reach the question of whether the decision of the Court below conflicts with the rulings of other circuits on the question presented by Petitioner—whether administrative agencies may refuse to give weight to uncontradicted testimony. For it is clear that the decision below cannot stand for the proposition which Petitioner attributes to it. The Commission considered Peterson's testimony and the other evidence relied upon by Petitioner and found it to be contradicted by other evidence of record. The Court of Appeals reviewed the Commission's decision based upon the evidence and concluded that the Com-

mission had not "ignored factors requiring consideration."

The decision below can therefore only stand as a ruling in a substantial evidence case in which the Court concluded that the Commission had not acted arbitrarily upon the entire evidence of record. It cannot, by any stretch of the imagination, be construed as a ruling that an administrative agency may disregard uncontradicted evidence.

## CONCLUSION

Under the above circumstances, the decision below cannot be construed as presenting a conflict with the decisions of other circuits or as presenting a question of the type and importance which merits or requires the review of this Court. The writ requested by Petitioner should therefore not issue.

Respectfully submitted,

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Dated: March 9, 1956

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# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 681

SOUTHSIDE VIRGINIA TELECASTING CORPORATION, PETITIONER

*v.*

FEDERAL COMMUNICATIONS COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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### OPINION BELOW

The *per curiam* opinion of the Court of Appeals (Pet. App. 1a) has not been reported.

### JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Federal Communications Commission, was entered on December 29,

1955 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on February 10, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and 47 U.S.C. 402 (j).

## QUESTION PRESENTED

Whether the Federal Communications Commission, in granting one of two mutually-exclusive applications for a television station, erred in not crediting testimony by the president of the unsuccessful applicant, which it found was not substantiated by the other evidence in the record.

## STATUTES INVOLVED

The pertinent sections of the Communications Act of 1934 and the Administrative Procedure Act are set forth in the petition, pp. 2-3.

## STATEMENT

Southside Virginia Telecasting Corporation, petitioner herein, and Petersburg Television Corporation, intervenor in the court below, filed applications with the Federal Communications Commission for a permit to construct a new commercial television station for operation on Channel 8 in Petersburg, Virginia. Since both applicants sought use of the same frequency, the applications were mutually exclusive and were designated for comparative hearing to determine which applicant would better serve the public interest as a television station licensee. See *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U.S. 327.

After a full comparative hearing, the Commis-

sion on October 1, 1954, granted the application of Petersburg Television, on the ground that operation of the station by it would best serve the public interest (R. 332). In its opinion the Commission made detailed findings of fact on the various grounds advanced by each applicant as to why its application should be granted.

The Commission found that both applicants were financially, technically, and legally qualified to operate the proposed station (R. 282). It concluded, however, that while both applicants proposed a diversified, well rounded program service (R. 318), the application of Petersburg Television was to be preferred, primarily because of the latter's superior "service philosophy." The Commission found that Petersburg Television would program for its entire service area, while Southside contemplated a narrower service designed to meet only the needs of the city of Petersburg and the "Southside Virginia" area immediately surrounding and to the south of Petersburg (R. 331, 322-326, 303-304), and which did not take into account the needs of the northern portion of its service area. Petersburg Television was also found to merit preference with respect to its plans for programming from areas remote from its studio and transmitter (R. 331, 321, 295), for better agricultural program proposals (R. 331, 320-321, 296-297), and for its more extensive utilization of the talent and program resources of Richmond (R. 331, 325-326, 292-293).

In concluding that Petersburg Television had the superior "service philosophy," the Commis-

sion took full account of the testimony of Southside's president and principal stockholder that while petitioner intended to place primary emphasis on roughly the southern half of its service area (Petersburg and Southside Virginia), it expected to devote secondary emphasis on the roughly northern part of the service area (R. 304). However, the Commission found that the record did not support those assertions (R. 304). It held (R. 304, 322) that the evidence showed that petitioner's programming proposals ignored the needs or desires of those who live in the northern half of its service area (R. 304, 322). It noted that while petitioner had made rather complete preparations for its programming proposal in the Petersburg and Southside Virginia area, it had made no contacts at all in the northern half of its service area. Moreover, all of its programming, other than that relating to state and national affairs, was designed for Petersburg and Southside Virginia to the exclusion of that part of its proposed service area lying north of the James River (R. 304-6, 322). This failure to consider the needs of the northern area, the Commission held, was particularly serious because none of the many small communities there has a television station and it is obviously desirable that clergymen, schools, and other local groups have as many opportunities and outlets for local expression as possible (R. 324).[1]

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[1] On the other hand, the Commission held, on the basis of the evidence, that Petersburg Television had made contacts

On appeal, the Court of Appeals unanimously affirmed the Commission's order. In a short *per curiam* opinion (Pet. App. 1a), the court concluded: "We do not find that the Commission ignored factors that required consideration or acted arbitrarily in choosing between the applicants."

## ARGUMENT

The only question which petitioner presents is whether the Commission erred in disregarding certain testimony by petitioner's president and principal stockholder as to the service which petitioner proposed to render in the northern portion of its service area. Although petitioner contends that the decision below, in sustaining the Commission's refusal to credit that testimony, conflicts with decisions in other circuits which hold that "uncontradicted testimony or evidence fully credited and worthy of belief cannot be totally disregarded by a fact finder as entitled to no weight whatsoever" (Pet. p. 7), there is in fact no such conflict of decisions. For, as pointed out in the Statement (*supra*, pp. 3-4), the Commission did not disregard this testimony, but considered it carefully and concluded that it could not be accepted because it was contradicted by other evidence in the record. In short, the Commission concluded that because of other impeaching evidence, the testimony should be neither "fully cred-

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both in person and by letter with many persons in its entire service area to determine their programming needs and interests (R. 292-4, 322-3).

ited" nor considered to be wholly "worthy of belief."

We submit that the Commission was not required to accept the self-serving testimony of an interested witness that Southside would serve the northern communities on a secondary basis, when other evidence in the record showed that Southside's actual programming plans and contacts did not provide for such service to those communities. Under these circumstances, the Commission's conclusion that Southside would "ignore or pay no heed to the roughly northern half of its coverage area, unless the Richmond stations fail in some respect in their programming for this area" (R. 324) was neither arbitrary nor unreasonable, but on the contrary constituted a justifiable inference from the facts in the record.[2]

The contention that the Commission had improperly rejected the testimony in question was

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[2] Petitioner's contention that the Commission failed to consider other evidence allegedly corroborative of the testimony of its president (Pet. p. 5) is without merit. The Commission fully considered the past programming of radio station WSSV which is wholly owned by petitioner's president and his wife (R. 289), and found that such programming was directed to Petersburg and Southside Virginia (R. 304, 313, 314). It also considered petitioner's proposed programming, but found it did not contemplate any substantial programming directed towards the special interests of the northern portion of its proposed service area (R. 303-306, 324-325, 331). The fact that petitioner hoped to sell advertising time in the Richmond area is clearly not a showing that its service would meet the needs of communities in the north, since many Richmond advertisers would be interested in reaching buyers in Southside Virginia.

fully pressed in the court below and that court concluded that the Commission had not "ignored factors that require consideration or acted arbitrarily in choosing between the applicants." There is no occasion for a further review by this Court of the evidentiary support for the Commission's findings. Cf. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474.

### CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question warranting further review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH, 1956.

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